INDEX

	Page
Statement	1
Argument	5
Conclusion	13

CITATIONS

Cases:

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373	9
Shenandoah Valley Broadcasting, Inc. v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39	5
United States v. *McKesson & Robbins*, 351 U.S. 305	9

Statute:

Sherman Act, 15 U.S.C. 1, 2:	
Section 1	2, 9
Section 2	2

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 775

COLUMBIA ARTISTS MANAGEMENT INC. AND COMMUNITY CONCERTS, INC., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States moves that the order of the district court be affirmed.

STATEMENT

This is a direct appeal from an order (J.S. A-21-22) of the district court entered in response to appellants' petition for construction of a consent judgment in a government civil antitrust case. The judgment was entered on October 20, 1955, in a suit

which charged appellants Columbia Artists Management Inc. ("Columbia") and its wholly-owned subsidiary Community Concerts, Inc. ("Community"), and appellees National Concert and Artists Corporation ("National") and its wholly-owned subsidiary, Civic Concert Service, Incorporated ("Civic"), with violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2).[1] Appellee Summy-Birchard, Inc., the successor to National and Civic, is bound by the decree and participated in the proceeding below.

Columbia and Summy-Birchard are managers of professional concert artists. Their respective concert service affiliates (Community and Summy-Birchard's Civic Concert Service Division) are engaged in organizing and maintaining in cities throughout the country local non-profit "audience associations" which sponsor concert series. The complaint charged (Par. 20) a combination and conspiracy to monopolize and restrain interstate commerce in the management and booking of concert artists and in the formation and maintenance of organized audience associations. Among the alleged effects of the violations charged were: audience associations were deprived of access to concert artists not controlled by the defendants, independent concert services were excluded from the business, and artists were compelled to subject themselves to the management and control of the defendants in order to obtain adequate bookings (Par. 21).

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[1] In a companion criminal case charging the same offenses, the defendants pleaded *nolo contendere* (J.S. A-16).

Paragraph VI(D) of the consent judgment requires that each defendant make available "to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee" (J.S. A-4). As defined in the judgment, a "concert service" is an organization that provides field representatives without charge to the audience association (Para. II(G), J.S. A-24), an "audience association" is a nonprofit association "organized for the purpose of presenting concerts * * * financed by membership dues subscribed in advance" (Para. II(F), J.S. A-24) and the "margin" is the portion of "an artist's established fee" which the concert service is authorized to retain as compensation for its services (Para II(J), J.S. A-25).

In making its concert artists available to Summy-Birchard pursuant to Paragraph VI(D) of the decree, Columbia has required Summy-Birchard to sign a standard contract under which the concert service must charge the audience association a designated fee and pay the artist a lower designated fee (J.S. A-4 - A-5). Summy-Birchard protested that this contract "constitute[s] an illegal scheme to maintain resale prices" because its effect is to eliminate price competition "between Community and other concert services with respect to performances by artists managed by Columbia," and signed it "under protest" (*ibid*). Columbia and Community then filed in the district court a petition for a construction of the con-

sent judgment. Insofar as is here relevant,[2] they sought a determination that the contract is not illegal under the decree or otherwise (J.S. A-8). In a supporting memorandum, the appellants urged that if the court were to rule that the decree does not sanction the contract, the court should then determine its validity under the Sherman Act (Memorandum of Columbia Artists Management, Inc., in Support of its Petition for Construction of the Final Judgment of October 20, 1955, Points II-B, III; J.S. A-8).

After hearing argument and re-argument, the district court held that the decree does not sanction the contract. The court's order states (J.S. A-22):

> The provision in Columbia's contract * * * that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid.[3]

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[2] The appellants also sought a ruling that Summy-Birchard, under its new system of organizing and maintaining audience associations, did not constitute a "concert service" as defined in the judgment, and that Columbia therefore was not required to furnish it with concert artists pursuant to paragraph VI (D). The district court so ruled (J.S. A-22), and Summy-Birchard did not appeal therefrom.

[3] Although on the original argument Summy-Birchard contended that the contract was illegal, it abandoned that con-

ARGUMENT

Appellants' attacks on the district court's order all assume that the net effect of the proceeding below was to modify the consent judgment. We submit that the assumption is unwarranted. Despite some ambiguous expressions in the opinions, the effect of the district court's action is not to change the consent judgment when properly construed and its order does not constitute a modification: In our view appellants have been subjected to no obligations not previously imposed by the judgment, and they have been deprived of no privilege. Consequently, the three questions posed by appellants are not raised for argument. The only question which the appeal would actually present is the meaning of a particular decree in a narrow and currently unimportant application. Moreover, the construction put upon the decree by the proceedings below seems plainly correct whatever the merits of the course by which the district court reached that conclusion.

1. The critical paragraph in the consent decree enjoined appellants (J.S. A-27)—

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tention on reargument. The United States, which originally had urged that the court had no jurisdiction to decide the issue because the decree does not deal with price fixing, reversed its position on reargument and urged the court to determine that the decree does not sanction the contract. Since the United States thus became one of the adversary parties on this issue in the district court, we agree with the appellants that the appeal properly lies to this Court rather than to the court of appeals. Cf. *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39, 40.

> from refusing to make available to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, *at the same margin allowed to the defendant or its affiliated concert service by that artist for a performance for the same fee.* [Emphasis added.]

Appellant Columbia, as manager, thereafter refused to make artists available except under a standard form agreement. The agreement in effect required a concert service to charge the audience association (the "consumer") the artist's "established fee" and allowed the concert service the same "margin" out of the fee enjoyed by appellant. Those terms were sanctioned by the decree. Appellant Columbia also imposed as a condition of making an artist available the additional requirement that the concert service agree to retain the full margin for itself (J.S. A-4-5) instead of reducing the net cost to audience associations by rebating all or a part of the margin, as Summy-Birchard apparently was willing to do. When Summy-Birchard challenged the legality of this additional requirement, appellants instituted the present proceeding seeking a judicial determination: (1) that its practice not only did not violate but was affirmatively sanctioned by the consent judgment, and alternatively (2) that the practice, if not affected by the decree, was nevertheless lawful. The district court ruled against appellants on both points.

2. The first question obviously deals only with the interpretation of the consent decree. The rationale of

the critical paragraph, quoted above, is clear enough. Appellants had been charged with monopolizing the business of furnishing performing artists to audience associations. The aim of the decree was to open up to others all aspects of the business of arranging concerts by performing artists through audience associations. Thus, the appellant concert service ~~Civic~~ was required to deal with managers other than appellant Columbia on equal terms, and appellant Columbia, as manager, was required to do business with concert services other than its affiliate Community without discrimination. It is also apparent that the judgment was drafted upon the theory that each artist had an "established fee" out of which would be paid the commission of his manager and the "margin" of the concert service. Accepting that predicate, one of the purposes of the judgment was to bar the appellants from discriminating in setting the fees and margins for particular concerts in such a way as to preserve their monopolistic position and defeat the purpose of opening up the business to others. Parts V and VI of the consent judgment contain a number of such provisions (J.S. A-27, A-28). The critical words in Part VI(D) requiring appellants to make artists available to rival concert services—

> at the same margin allowed to the defendant or its affiliated concert service

obviously were intended to serve the purpose of preventing Columbia from discriminating against concert services other than its affiliates by refusing to allow them as high a margin for costs and expenses

as its affiliates.* Since the draftsmen were concentrating on preventing discrimination against unaffiliated concert services, there was little reason to be thinking of what the unaffiliated service might do with its margin or the possibility that the unaffiliated service would be willing to accept a lower net return than the affiliated service. That the consent judgment was not intended to bar such an arrangement is also indicated by the comparable provision in Part VI(A) which requires Columbia, as manager, to make an artist available "at the same fee" charged when the concert is arranged by organizations affiliated with appellants; certainly no one supposed that this provision left appellants free to refuse to make an artist available when the local audience association wished to pay a fee higher than that normally charged by the artist.

In any event, what the unaffiliated service does with its margin once received is obviously irrelevant to any of the problems of opening up the business and preventing discrimination. They are the problems with which the consent judgment is concerned. To read into the words "at the same margin" an intent to freeze the margin in the hands of the concert service and bar it from offering its services at a lower cost

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* A possible additional reason for the draftsmen's use of the words "at the same margin" is the risk that Columbia might take a higher margin out of the performer's established fee for an unaffiliated concert service in order to discourage performers from accepting engagements arranged through unaffiliated services. This explanation, however, seems unlikely.

to the audience associations than ~~appellant's~~ Columbia's services by rebating a portion of the margin would not only go beyond any of the problems revealed by the complaint but would give the decree the effect of eliminating a lively source of competition—the concert service willing to arrange concerts for a lower charge than appellants were making.

3. Were there any ambiguity in the clause in question, it would be relevant to consider which of the alternative constructions conforms to other requirements of the Sherman Act. An antitrust decree must be presumed not to authorize violations of Section 1. The fact that appellants' construction of Part VI(D) would sanction illegal price-fixing whereas the construction suggested above would read the decree to conform to settled principles, is the strongest possible reason for giving the decree the latter interpretation.[5]

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[5] The district court was correct in holding that appellant's standard form of agreement constituted illegal price-fixing under Section 1 of the Sherman Act. The effect of the contract was to eliminate price competition between concert services in terms of their charge for arranging engagements by performing artists, *i.e.* Columbia was fixing the fee received by the concert services. From the standpoint of appellants it was not improper to liken Summy-Birchard and other concert services to the "buyer" of an artist's performance which they would "resell" to the audience association and a reduction of the margin was in effect a "price-cut" on the resale. J.S. A-12; cf. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373; *United States* v. *McKesson & Robbins*, 351 U.S. 305.

Contrary to appellants' suggestion, there is no question here about the power of the performing artist to protect what he regards as his reputation by refusing to perform

4. It is not altogether clear whether the district court ultimately accepted or rejected the foregoing analysis. Its original opinion, we must acknowledge, seems to hold that the consent judgment authorized Columbia, as manager, "to control the ultimate price paid by the 'consumer'—audience association, impressario, or whoever assumes the risk of 'producing' a show" (J.S. A-9). Apparently the court was talking about the net cost to the associations. It then went on "to consider charges of illegality against the system" (*ibid*), and implied that it would relieve the parties from complying with the judgment "where it is patently void" (J.S. A-12).

On the other hand, even in that opinion the district court summarized its ruling upon appellants' two claims by granting the first and saying of the second (*ibid;* emphasis added):

> The request *for a construction* approving Columbia's contracts with concert services (Claim II) is denied.

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when the cost to the audience association is less than his standard fee. One may wonder how it can possibly injure the artist for the audience association (and presumably the audience) to know that the concert service has reduced *its* allowance. But there is no need to speculate upon the point because Columbia, an agent or broker with an economic interest of its own, has no power to assert whatever privilege may be possessed by the performing artist himself with respect to the charge to the audience. Columbia, with its interests as manager and its affiliated interest as a concert service, is not acting solely in the artists' interests.

In the opinion on reargument the court again stated (J.S. A-16) that in the first opinion it had merely refused—

> to find and rule that a standard contract provision used by them [Columbia] in "selling" performances to other contract services was proper under the decree.

And it indicated in another passage that to some extent it viewed the problem "as essentially one of construction" (J.S. A-19, n. 5).

Similarly, the penultimate sentence in the opinion on reargument is at least susceptible of being read as an assertion that the court would not construe the consent decree as sanctioning a *per se* violation of the Sherman Act (J.S. A-20).

The order leaves the question open for it merely says that (J.S. A-22; emphasis added)—

> *To the extent* that the Final Judgment operates to allow Columbia to set such resale prices

it is illegal and void. This is hardly enough to indicate an affirmative opinion that the final judgment did authorize price-fixing.

5. Whatever the course by which its decision was reached, the order of the district court subjects appellants to no obligations not already imposed by the original consent judgment properly interpreted. The district court added no prohibition against "resale price-fixing" as such. The original decree left that question at large, just as it neither approved nor forbade other activities in which appellants might engage but which were not involved in the action. If

Columbia and concert services *voluntarily* execute the standard form agreement, the government cannot proceed by reason of that fact alone, against Columbia for violation of the decree but will be required to file either an original or supplemental bill charging violation of Section 1 of the Sherman Act. Nor can appellants complain that the district court ventured into an area not covered by the consent judgment; it was they who asked the district court to rule on the legality of such contracts even apart from the judgment.

Appellants are subject to citation for contempt if they refuse to make artists available to a financially-responsible concert service at the same margin allowed to their affiliated concert services except upon the condition that the unaffiliated service stipulate that it will return no part of its margin to the audience association. That practice would violate Part VI(D) of the consent judgment because it adds a new condition to those on which Part VI(D) requires Columbia to make artists available to unaffiliated concert services. Such was in fact the meaning of the judgment as originally entered, we contend, whether the district court supposed that it was modifying or merely construing Part VI(D).

The correct construction of the decree, even if fairly debatable, has only marginal significance. So far as we are aware or the record shows, Summy-Birchard was the only concert service desiring to return to audience associations part of the margin allowed by appellants. As stated in the opinion of the district court on reargument (J.S. A-17), Summy-Birchard

is apparently no longer seriously interested in pursuing that course of business.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted.

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